BORA LASKIN LAW LIBRARY
3 1761 04866 6374

WILLS AND ESTATE PLANNING

MATERIALS

ON

ESTATE PLANNING

1999-2000

Compiled by Bonnie Croll

These materials are not to be considered as published. They are for the sole educational use of students at the Faculty of Law, University of Toronto

BORA LASKIN LAW LIBRARY
AUG 2 3 1999
FACULTY OF LAW
UNIVERSITY OF TORONTO

WILLS AND ESTATE PLANNING

MATERIALS

ON

ESTATE PLANNING

1999-2000

Compiled by Bonnie Croll

These materials are not to be considered as published. They are for the sole educational use of students at the Faculty of Law, University of Toronto

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsonestat00crol_3

TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION **1**

1. ESTATE PLANNING 1
2. GENERAL OBJECTIVES 2

Glossary of Terms *5*

Stubart Investments Limited (Appellant) v. Her Majesty The Queen (Respondent) 6

General Anti-Avoidance Rules Part XVI - s. 245 I.T.A. 19

CHAPTER 2 - THE POSITION OF THE PERSONAL REPRESENTATIVE **21**

Duties of the Personal Representative 21

Trustee Act R.S.O. 1990, Chapter 23 ..... *24*

Sample Advertisement for Creditors *24*

Income Tax Return for Deceased - s. 150(1)(b), (c), (d) I.T.A. 25

Section 150: Returns. 25

Clearance Certificates - s. 159 I.T.A. 26

Information Circular 82-6R — Clearance Certificate 27

Nicole Bougie and Marc Bougie (Plaintiffs) v. Her Majesty the Queen (Defendant) [1990] 90 D.T.C. 6529. 30

Sharon Boechler, Executrix of the Estate of Alexander , Deceased (Plaintiff) v. Her Majesty the Queen (Defendant) [1991] 2 C.T.C. 168, 91 D.T.C. 5506 33

CHAPTER 3 - INCOME TAX CONSEQUENCES OF DEATH - INCOME **34**

Income Inclusions in Terminal Return 34

Separate Returns 35

The Rights or Things Return *35*

Other Returns *36*

Interpretation Bulletin IT-212R3 - Income Of Deceased Persons —Rights Or Things 36

Income Tax Return in Year of Death - Example for Discussion 38

CHAPTER 4 - INCOME TAX CONSEQUENCES OF DEATH - CAPITAL PROPERTY OWNED AT DEATH **39**

Capital Property s. 54 I.T.A. 39

Income or Capital 39

Deemed Disposition of Capital Property at Death s. 70(5) - ITA 41

Relief from Deemed Disposition 41

Spousal Rollover - Transfer or Distribution to Spouse or Spouse Trust s.70(6) - ITA 42

Election out of Rollover s. 70(6.2) - ITA 42

Definition of Spouse s. 252(4) - ITA 43

Sample Clause Establishing Spouse Trust 43

Winnifred M. Hillis and Irvin Hillis (Appellants) v. Her Majesty The Queen (Respondent). [1983]C.T.C. 348, [1983 D.T.C. 5365 (F.C.A.) 44

Interpretation Bulletin IT-449R - Meaning Of "Vested Indefeasibly" 54

Thelma Arlene Greenwood and Elgin Evan Coutts, Executors and Trustees of the estate of Sidney Greenwood, Deceased (Appellants/Plaintiffs) v. Her Majesty the Queen (Respondent/Defendant) (1990), 39 E.T.R. 276, [1990] 90 D.T.C. 6990, aff'd by Fed. C.A., Dec. 9, 1993, [1994] 94 D.T.C. 6190 (F.C.A.) 57

Meaning of "Indefeasibly Vested' for Purposes of Spousal Rollover 61

CHAPTER 5 - SPOUSE TRUST **64**

Income of Spouse Trust 64

Income of Trust s.108(3) - ITA 65

No Disqualification of Spousal Trust s.108(4) - ITA 65

Occurrences as a Consequence of Death s. 248(8) -ITA 65

Overview - Transfer As A Consequence Of Death 66

Interpretation Bulletin IT-305R4 - Testamentary Spouse 67

CHAPTER 6 - CAPITAL PROPERTY OWNED AT DEATH - OTHER RELIEVING PROVISIONS 71

Principal Residence Exemption 71
Lifetime Capital Gains Exemption 72
Crystallization of Capital Gains Exemption 73

CHAPTER 7 - TAXATION OF ESTATE, TESTAMENTARY TRUST AND BENEFICIARY 74

Reference to Trust or Estate - s. 104(1) I.T.A. 74
Thibodeau Family Trust v. The Queen 3 E.T.R. 168, [1978] C.T.C. 539, [1978] 78 D.T.C. 6376 74
Interpretation Bulletin IT-447 - Residence Of A Trust Or Estate 81
21 Year rule - Deemed Disposition by Trust s. 104(4) - ITA 83
Commentary on 1991 changes to extend the 21-year rule 85
By Samuel Slutsky 85
By Neil Brooks and Linda McQuaig 85
From the Globe and Mail, May 31, 1994 87
1995 Federal Budget - More Changes! 87

CHAPTER 8 - ALLOCATION OF INCOME AND CAPITAL GAINS TO BENEFICIARIES 88

Reduction in Computing the Income of the Trust 88
Paid or Payable to Beneficiary 88
Benefit Under Trusts s.105(2) - ITA 88
Designation to Retain Income 88
Administrative Practice 89
William H. Grayson (Appellant) v. The Minister of National Revenue (Respondent). (1990) 1.C.T.C. 2303, [1990] 90 D.T.C. 1108 (TCC) 90
Allocation of Income From Trust 92
Interpretation Bulletin IT-286R2 - Trusts—Amount Payable 92
Distribution of Capital From Trust s.107(2) - ITA 94
Distribution of Principal Residence S.107(2.01) - ITA 95

CHAPTER 9 - "SOME HISTORY" - PREFERRED BENEFICIARY ELECTIONS 97

Clause Establishing Basic Children's Trust 97
Preferred Beneficiary Election 97

CHAPTER 10 - BASIC WILL PLANNING 99

Ross v Caunters (a firm) [1979] 3 All E.R. 580 99
White v. Jones, [1993] 3 All E.R. 481 (C.A.); [1995] 2 W.L.R. 187 (H.L.). 109
Hickson v. Wilhelm Saskatchewan Court of Queen's Bench [1997] S.J. No. 554 130
Crowe (Committees of) v. Bollong [1998] B.C.J. No. 771 140
Sample Clause Authorizing Trustees to Allocate Assets between Family Trust and Spousal Trust 142

CHAPTER 11 - POST MORTEM PLANNING 144

Disclaimers, Releases or Surrenders by Beneficiaries - s. 248(8) - ITA 144
Saunders v. Vautier (1841), Cr + Ph.240 41 E.R. 482 (Ch) 145
Variation Of Trusts Act, R.S.O. 1990, c.V.I. 147
Why vary a trust? 147
George A. Murphy (Plaintiff) v. Her Majesty The Queen (Defendant) [1980] C.T.C. 386; [1980] 80 D.T.C. 6314 (F.C.T.D.) 148

CHAPTER 12 - INTER VIVOS PLANNING 156

Uses of Trusts in Estate Planning 156
Income Tax Consequences of Gifts 156
Inadequate Consideration - s.69 I.T.A. 158
Interpretation Bulletin IT-405 - Inadequate Considerations-Acquisitions And Dispositions 158

CHAPTER 13 - INTER VIVOS PLANNING - INCOME SPLITTING 160

Inter Vivos Transfer of Property to Spouse or Spouse Trust - s.73(1) ITA 160
Income Splitting and Non Arm's Length Dispositions 161

Joseph B. Dunkelman v. Minister of National Revenue. C.T.C. 375, [1959] 59 D.T.C. 1242 163
"Normal" Attribution Rules 168
Attribution of income 168
Transfers and loans to spouse - S.74.1 I.T.A. 168
Transfers and loans to minors - S.74.1(2) I.T.A. 169
Attribution of Gains or Losses - S.74.2 I.T.A. 169
Transfers or Loans to a Trust 169
Attribution of Trust Income to Settlor -S.75(2) ITA 171
Interpretation Bulletin IT-369R — Attribution Of Trust Income To Settlor 174
Transfers or Loans to a Corporation - S.74.4 ITA 176
Her Majesty the Queen (Appellant and Respondent by Cross-Appeal) v. Albert Kieboom (Respondent and Appellant by Cross-Appeal) [1992] 46 E.T.R. 229 (F.C.A.), [1992] 92.D.T.C. 6382 178
The Queen v. Kieboom, 92 DTC 6382 (FCA) 184
Interpretation Bulletin IT-511R- Interspousal and Certain Other Transfers and Loans of Property 184
Indirect Payments S 56(2) I.T.A. 190
Her Majesty the Queen (Appellant) v Jim A McClurg (Respondent) [1990] 91 D.T.C. 5001 190
The Queen v. Neuman [1990] 91 D.T.C. 5001 202
Neuman v. Minister of National Revenue, Federal Court of Appeal 210
Neuman v. The Queen, [1998] S.C.J. No. 37. 222
Non-arm's Length Indebtedness - s.56(4.1) - ITA 227

CHAPTER 14 – PROBATE PLANNING 229

Probate Trusts 229
Granovsky v. Ontario [1998] O.J. No. 508 231
Eurig Estate (Re) - Marie Sarah Eurig, as Executor of the Estate of Donald Valentine Eurig, appellant v. The Registrar of the Ontario Court (General Division) and the Attorney General for Ontario, respondents [1998] 2 S.C.R. 565, S.C.J. No. 72 237

CHAPTER 15 - ESTATE FREEZING 238

What is an Estate Freeze? 238
Exchange of shares by a Shareholder in Course of Reorganization of Capital s.86 (1) I.T.A. 240
Section 86 Estate Freeze 240
Spring 1999 -- Federal Budget Proposals Regarding Family Trusts 243
Transfer of property to corporation by shareholders. s.85 (1)(a),(b),(c) I.T.A. 243
Section 85 (1) Estate Freeze 244
The Howard Langer Family Trust v. Minister of National Revenue [1992] 1 C.T.C. 2119 245
Some Estate Planning Problems for Discussion 250